81-46

Office-Supreme Court, U.S.
FILED
JUN 29 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. _____

_____

_____

DAVID ALAN RIVES,

PETITIONER,

-vs-

UNITED STATES OF AMERICA,

RESPONDENT.

_____

_____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

_____

_____

PHILIP A. DeMASSA
Attorney at Law
2150 First Avenue
San Diego, California 92101
Telephone: (714) 236-0897

Attorney for Petitioner
DAVID ALAN RIVES

QUESTION PRESENTED FOR REVIEW

Do Border Patrol agents have authority to make arrests for non-alien and no-drug related crimes?

INDEX

	Page
Table of Cases	ii
Opinion Below	2
Jurisdiction	2
Question Presented for Review	2
Importance of the Question Presented	2
Constitutional Provision Involved	3
Statutory Provision Involved	3
Statement of the Case	6
Reasons For Granting The Writ	7
Conclusion	12
Appendix A - Opinion of the Court of Appeal May 26, 1981	

TABLE OF CASES

Cases:	Page
Terry v. Ohio, supra (Quote).....	8
United States v. Brignoni—Ponci, 422 U.S. 873 (1975).....	7
United States v. Cantu, 504 F.2d 387 (10th Cir. 1974).....	11
United States v. Cortez, ___U.S.___, 101 S.Ct. 690, 695 (1981).....	7,9
United States v. Gooch, 603 F.2d 122 (10th Cir. 1969).....	10
United States v. McCormick, 468 F.2d 68 (10th Cir. 1972).....	11
Statutes:	
8 U.S.C. §1357(a)(1)-(4).	2,3,10,11, 12
18 U.S.C. §545.....	7
28 U.S.C. §1254(1).....	2
United States Constitution Amendment IV	3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. _____

_____

_____

DAVID ALAN RIVES,

PETITIONER,

-vs-

UNITED STATES OF AMERICA,

RESPONDENT.

_____

_____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

_____

_____

Petitioner, David Alan Rives, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered May 26, 1981.

OPINION BELOW

The Court of Appeals entered its unpublished decision, No. 80-1593, on May 26, 1981. A copy of the opinion is attached as Appendix "A".

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

IMPORTANCE OF THE QUESTION PRESENTED

Title 8, United States Code, Section 1357(a)(1)-(4) grants Border Patrol agents the authority to make warrantless arrests for alien-related felonies. Case law allows Border Patrol officers to make warrantless arrests for drug-related crimes when the officers have particular evidence of the possession of the drug. The disparity between the statute, the case law, and petitioner's arrest for smuggling, requires this Court to address the issue of the authority of Border Patrol agents.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated..."

STATUTORY PROVISION INVOLVED

Title 8, United States Code, Section 1357:

(a) Powers without warrant. Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant -

(1) To interrogate any alien or person believed to be an alien as to his right to be or remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or

to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry

of aliens into the United States; and

(4) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, or explusion of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States. Any such employee shall also have the power to execute any warrant or other process issued by any officer under any law regulating the admission, exclusion, or expulsion of aliens.

STATEMENT OF THE CASE

At approximately 3:00 a.m. on March 21, 1980, United States Border Patrol Officer Terence Bonner, while on roving patrol, observed a vehicle drive east on Highway 94 and then south on Highway 188 in the direction of Tecate, California. Some 30 minutes later, the officer saw what appeared to be the same vehicle drive north on Highway 188 and then west on Highway 94. Officer Bonner radioed Border Patrol Officer J. Econony to visually check out the vehicle when it passed him. Officer Econony saw a vehicle, a 1979 Volvo Station wagon, pass by his location and he radioed Officer Bonner that the vehicle appeared to have cages in the back. The vehicle's registration was obtained by radio.

At approximately 3:30 to 4:15 a.m., the border patrol agents stopped the vehicle, containing petitioner in front of the Dulzura Cafe in Dulzura, California. The windows of the vehicle were fogged.

Officer Bonner asked Mr. Rives what he was carrying in the vehicle, to which he responded parrots. Petitioner was detained until approximately 5:15 to 5:35 a.m., at which time United States Customs Officers Phillips and Sundstrom came onto the scene, removed Mr. Rives to

their customs vehicle and interrogated him, and elicited various statements. Three air waybills were taken from petitioner during the initial interrogation by Border Patrol Officer Bonner, and an additional five waybills were removed from the glove compartment of Mr. Rives' vehicle. In addition, five checks were taken from the person of petitioner.

Petitioner was convicted of illegally transporting merchandise contrary to law, 18 U.S.C. §545. The United States Court of Appeals for the Ninth Circuit affirmed the conviction.

REASONS FOR GRANTING THE WRIT

The fundamental right to be free from unreasonable searches and seizures has long been respected by this Court. United States v. Brignoni-Ponci, 422 U.S. 873 (1975).

In order for a Border Patrol Agent to lawfully detain a vehicle, this Court has stated that the totality of the circumstances must give rise to a "particularized and objective basis for suspecting the particular person stopped of criminal activity." United States v. Cortez, ___U.S. ___, 101 S.Ct. 690, 695 (1981). In United States v. Cortez, supra, Chief Justice Burger stated the elements necessary for a Border Patrol stop, and petitioner can add little else.

"The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all the circumstances.

...

The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing. Chief Justice Warren, speaking for the court in Terry v. Ohio, supra, said '[t]his demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment

jurisprudence.'"
[citations deleted].
United Stats v. Cortez,
supra, at 695.

It is therefore patently obvious that this Court deems Fourth Amendment guarantees to be of paramount importance.

Petitioner's case offers this Court the opportunity to more precisely define Chief Justice Burger's "totality of the circumstances" test. In Cortez, defendant "Chevron" was the object of a weeks-long investigation. Based on human footprints in the desert, Border Patrol agents knew which part of the highway Chevron would use, and which night he would attempt another trip. The pickup truck they stopped traveled west, and then east an hour and one-half later. This fit the pattern calculated by the agents.

Petitioner, however, was the object of no such investigation. The officers who stopped petitioner had not been tracking an alien smuggler. They did not expect illegal aliens to be traveling between Tecate and Dulzura. They had no anticipated date or time frame. They stopped petitioner simply because he was making a round-trip from Dulzura to Tecate early in the morning. Petitioner is not of Mexican ancestry and was traveling alone.

The only articulable facts supporting the stop were the round-trip journey late at night. Petitioner respectfully asks this Court to determine if roving Border Patrol agents are now authorized to stop any citizen who makes late round-trip border journeys.

The right of Border Patrol agents to infringe on Fourth Amendment rights is delineated at 8 U.S.C. §1357(a)(1)-(4). Specifically, Border Patrol agents are empowered to make warrantless arrests for felonies which have been committed under any United States law regulating the admission, exclusion, or expulsion of aliens. 8 U.S.C. §1357(a)(4). The plain language of the state grants power to arrest for alien-related felonies.

Petitioner, however, was arrested by Border Patrol agents and later convicted for smuggling parrots. It is appropriate and necessary for the Court to address the question of the authority of Border Patrol agents to arrest for "non-alien" crimes.

Searches by Border Patrol agents which fall outside the scope of a reasonable search for aliens have not been unpheld. See United States v. Renigfo-Castro, 620 F.2d 230 (10th Cir. 1980) [search of locked suitcases], United States v. Gooch, 603 F.2d 122 (10th Cir. 1969) [search of a jacket].

The Courts have upheld arrests for marijuana violations, however, when Border Patrol agents have had probable cause to search for marijuana. United States v. McCormick, 468 F.2d 68 (10th Cir. 1972) [arresting officers were Border Patrol agents and Customs Inspectors] and United States v. Cantu, 504 F.2d 387 (5th Cir. 1974) [Border Patrol agent observed marijuana debris in the vehicle]. Petitioner respectfully points out that the cases of Border Patrol arrests for marijuana violations are readily distinguishable form his case. Possession of marijuana is in and of itself a crime. Possession of parrots is not. An odor of, or debris from marijuana, therefore, gives a Border Patrol officer probable cause to believe that the person detained is in possession of marijuana. The agent then has the right to search therefore. The sight of bird cages and the statements of the detainee that he is importing birds does not give probable cause to believe that a crime is being committed.

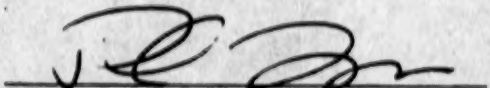
The fact situation presented by petitioner does not fall within the ambit of 8 U.S.C. §1357(a). Petitioner was neither transporting aliens, nor arrested for alien smuggling. Petitioner's case also does not fit within the purview of the marijuana

arrest cases delineated above. The power of the Border Patrol to make arrests for crimes not outlined in 8 U.S.C. §1357(a) is a pressing question which is properly resolved by this Court.

CONCLUSION

For all the reasons stated herein, petitioner respectfully requests this Court to grant the writ prayed for, and review the decision below.

DATED: June 26, 1981



PHILIP A. DeMASSA
Attorney for Petitioner
DAVID ALAN RIVES

APPENDIX "A"

(Not for Publication)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plantiff-Appellee, v. DAVID ALAN RIVES, Defendant-Appellant.	)	No. 80-1593 MEMORANDUM

Appeal from the United States District Court for the Southern District of California

No. 80-0222

Honorable Leland C. Nielsen, District Judge, Presiding

Argued and Submitted February 6, 1981

Decided _____

Before: KELKENNY and CANBY, Circuit Judges, and EAST,* District Judge

---

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX "A"

Rives appeals his conviction for illegally transporting merchandise imported contrary to law, 18 U.S.C. § 545, asserting that he was illegally stopped and detained. We note jurisdiction under 28 U.S.C. § 1291 and affirm.

The stop of Rives' car was not illegal. The border patrol officers possessed enough specific articulable facts to constitute founded suspicion that criminal activity may have been occurring. See United States v. Cortez, 49 U.S.L.W. 4099 (U.S. Jan. 21, 1981); United States v. Brignoni-Ponce, 422 U.S. 873 (1975). Here, these included the early morning hour, the unfamiliar vehicle in an area known to the border patrol officer, the past existence of criminal activity when vehicles were stopped under similar circumstanctes, the vehicle registration, and the observation that the windows were steamed up, all evaluated in light of the officers' experience. The District Court's findings that founded

suspicion existed was not clearly erroneous.

Nor was Rives illegally detained after being stopped. The admission that he was carrying a large number of parrots, the absence of any importation or registration papers for them, the improbability that they had been domestically bred, his lying about where he had driven from, combined with the officers' special training regarding smuggling, are sufficient to establish probable cause to believe that a customs violation had occurred. These facts were adequate to support the one hour detention while awaiting the arrival of customs agents.

Finally, the border patrol officers did not exceed their authority in detaining Rives while waiting for the customs agents. See United States v. DeCatur, 430 F.2d 365 (9th Cir. 1970). Since under DeCatur the officers could have legally arrested Rives, the short detention was permissible.

The judgment of conviction and sentence is AFFIRMED.